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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO GERONIMO,

Defendant and Appellant.

H034331

(Monterey County

Super. Ct. No. SS082824A)

Defendant Julio Geronimo appeals from a judgment entered after a jury trial in which he was convicted of attempted second degree robbery. (Pen. Code, § 211/664.) On appeal, he asserts error in the denial of his motion for a new trial based on juror misconduct. We find merit in his contention and therefore must reverse the judgment.

Background

Around 11:30 p.m. on November 22, 2008, two men attempted to rob George Swindle as he was walking along the street near his home in Watsonville. Swindle later identified defendant as one of the perpetrators. At trial the defense offered evidence that defendant was at the apartment of his children's mother that night from 11:30 p.m. to 5:00 a.m. It also presented extensive testimony by expert witness Robert Shomer, Ph.D., regarding the limitations of eyewitness perception and identification.

The jury found defendant guilty of the only offense charged in the information, attempted second degree robbery, and found true an additional allegation that defendant

had served a prior prison term. (Pen. Code, § 667.5, subd. b.) Before sentencing, defendant filed his motion for a new trial, asserting insufficiency of the evidence and juror misconduct. The trial court denied the motion and sentenced defendant to the upper term of three years in prison, plus one year for the prison prior.

Discussion

The motion for a new trial was based in large part on a declaration submitted by Juror 9, which, according to defendant, revealed misconduct by another juror. In the portion of the declaration pertinent to this appeal, Juror 9 recalled a statement made by another juror relating to a teardrop tattoo under defendant's left eye¹: "During the jury deliberations which began on March 26, 2009 and ended on March 27, 2009, I was informed by another juror(s) that Mr. Geronimo's character was brought into question based on his facial tattoo, which is a tear drop under his left eye. Although, I did not personally see the tattoo on Mr. Geronimo's person in court, I was informed about it by another juror(s). This other juror(s) stated that the tattoo signified that Mr. Geronimo either 'served time or killed someone' so that 'spoke to his character' and 'brought into question his character.' Some of the jurors may have been prejudiced by the tattoo."

Defendant argued that the use of information "gleaned or assumed" outside the evidence presented at trial had contributed to the jury's guilty verdict. On appeal, he points out that the subject of tattoos was thoroughly covered during voir dire, and that four prospective jurors were excused for cause because they associated tattoos with unfavorable characteristics, which compromised their ability to weigh the evidence fairly. The juror referenced in the declaration, however, apparently made no disclosure regarding beliefs or attitudes about the significance of tattoos, particularly teardrop tattoos.

¹ The declaration appears to have been (ineptly) drafted by defense counsel.

In its opposition to the motion, the prosecution argued that the declaration was inadmissible under Evidence Code section 1150 and therefore could not support a finding of misconduct. However, the prosecution itself submitted a second declaration from Juror 9 adding more factual detail to the previous one. In this document Juror 9 stated that he or she had not noticed the tattoo on defendant's face until the jury was deliberating, "when another juror pointed the tattoo on the Defendant's face out, in the photograph submitted by the defense attorney. Although there was a brief discussion speculating [*sic*] the meaning behind this particular tattoo our verdict was not based on this fact. We always referred back to the jury instructions and the Judge's instructions on what we were able to consider. [¶] Our verdict was based solely on the evidence that the law allowed us to consider. The 'connecting evidence' was overwhelming. We always went back to let the jury instructions guide us on what we could consider in rendering our verdict. This tattoo did not weigh on my verdict. I am confident in my verdict and this Defendant was guilty beyond a reasonable doubt based on the evidence."

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16) A defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors.

"Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." ' [Citations.]' (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1123; *People v. Duran* (1996) 50 Cal.App.4th 103, 111.) Furthermore, under Penal Code section 1181, a motion for a new trial may granted if the jury has "received any evidence out of court, other than that resulting from a view of the premises, or of personal property."

"A juror may commit misconduct by receiving or proffering to other jurors information about the case that was not received in evidence at trial." (*In re Lucas* (2004) 33 Cal.4th 682, 696; *People v. Nesler, supra*, 16 Cal.4th at p. 578.) "It is not improper

for a juror . . . to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963; *In re Lucas, supra*, 33 Cal.4th at p. 696.)

In this case the trial court did not receive evidence other than the declarations of Juror 9. It expressly found both declarations admissible "except for the portion of the defense declaration that states some jurors may have been prejudiced. That was speculation and not permissible or admissible." In denying the motion the court explained, "I will deny the motion because I don't view that what was discussed is juror misconduct under the cases that I've reviewed. And, therefore, deny the motion because it is not misconduct justifying a new trial. There was only a brief discussion of the tattoo. And I do not feel it rises to the level of being juror misconduct."

We disagree with the trial court's conclusions. First, there was no evidence regarding how "brief" was the "brief discussion" about the meaning of the tattoo. The court's rejection of the significance of this discussion could only have been based on Juror 9's second declaration, stating that the jurors' discussion had no effect on their verdict. However, Juror 9's description of the jurors' deliberations and the basis of their verdict was clearly inadmissible under Evidence Code section 1150.² The only

² Evidence Code section 1150 provides, in subdivision (a), "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror

admissible evidence that is relevant was the fact that one juror informed the others that defendant's teardrop tattoo meant that he had served time or killed someone. This juror injected "specialized information obtained from outside sources" rather than from evidence received at trial. (*People v. Nesler, supra*, 16 Cal.4th at pp. 578-579; *In re Malone, supra*, 12 Cal.4th at p. 963) As the errant juror himself or herself remarked, this information "spoke to" defendant's character. The assertion he or she made to the other jurors, whether accurate or not, was improper and constituted misconduct.

"Juror misconduct raises a rebuttable presumption of prejudice; a trial court presented with competent evidence of juror misconduct must consider whether the evidence suggests a substantial likelihood that one or more jurors were biased by the misconduct." (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) A substantial likelihood of juror bias "may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*People v. Nesler, supra*, 16 Cal.4th at pp. 578-579, citing *In re Carpenter* (1995) 9 Cal.4th 634, 653-654.)

The verdict must be set aside if either form of prejudice has resulted from the improper receipt of extraneous information. "The requirement that a jury's verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public

either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.' [Citation.] As the United States Supreme Court has explained: 'Due process means a jury *capable and willing to decide the case solely on the evidence before it . . .*' [Citations.]" (*People v. Nesler, supra*, 16 Cal.4th at p. 578, quoting *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 and *Smith v. Phillips* (1982) 455 U.S. 209, 217.)

A substantial likelihood of either inherent or actual bias calls for a review of the entire record. A finding of inherent prejudice "is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment." (*In re Carpenter, supra*, 9 Cal.4th at p. 653.) If, on the other hand, "we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler, supra*, 16 Cal.4th at p. 579; *In re Carpenter, supra*, 9 Cal.4th at p. 654.) When determining actual bias, the court considers "the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Id.* at p. 654.) If the likelihood of actual bias is indeed substantial, then the verdict must be set aside "no matter how convinced we might be that an unbiased jury would have reached the same verdict." (*Ibid.*)

On appeal, the reviewing court independently considers the question of whether juror misconduct was prejudicial, as this is a mixed question of law and fact. The trial court's credibility determinations and findings on pure questions of fact, however, are still reviewed under the more deferential substantial evidence standard. (*People v. Nesler, supra*, 16 Cal.4th at p. 582 & fn. 5.)

In this case, the trial court did not hold an evidentiary hearing, and, having found no misconduct based on the declarations of Juror 9, it did not go on to determine whether there was a substantial likelihood of actual or inherent juror bias. Nevertheless, we cannot conceive of an outcome other than a substantial likelihood of actual bias. Because the People have not rebutted the presumption of prejudice arising from juror misconduct, the "fundamental integrity" of the trial has been compromised and the verdict must be set aside. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 655; *People v. Nesler*, *supra*, 16 Cal.4th at p. 579.)

Disposition

The judgment is reversed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.